STATE OF MICHIGAN

COURT OF APPEALS

MARGARET BARBER, Plaintiff-Appellee,	UNPUBLISHED May 22, 2008
v	No. 275314 Oakland Circuit Court
WILLIAM BEAUMONT HOSPITAL, Defendant-Appellant.	LC No. 2005-063897-NH

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Plaintiff Margaret Barber filed a cause of action alleging nursing malpractice against defendant William Beaumont Hospital. After a jury trial, the trial court awarded a $197,528.58 judgment in favor of plaintiff. We affirm.

In July 2002, doctor Kenneth Tobin, a cardiologist at Beaumont, determined that plaintiff had extensive problems with her heart requiring open-heart surgery. On July 24, 2002, Doctor Shannon,[1] a surgeon at Beaumont, performed double coronary artery bypass and mitral valve repair surgery on plaintiff's heart.[2] As was customary at Beaumont, Shannon remained in control of plaintiff's care after surgery, although Tobin worked with him closely during this time. Plaintiff's mother, Eileen Cooper, traveled from her home in Florida to be with plaintiff during and after her surgery.

[1] The lower court record does not indicate Dr. Shannon's first name.

[2] Tobin did not expect plaintiff's heart function to become normal after the surgery because it was not normal to begin with. Instead, the surgery was designed to repair plaintiff's heart so it could function in a manner that was as close to normal as possible. However, Tobin explained that even with surgery, plaintiff would never have a heart that was as good as normal.

Plaintiff took slightly longer than normal to recover after surgery. Tobin was not surprised that she took longer to recover because her surgery involved two separate procedures. Tobin also noted that plaintiff's expectation before surgery that she would return to work within two months was very optimistic. He explained that most patients needed three to six months to recover from open-heart surgery.

After surgery, plaintiff was transferred to 2 East, the intensive care unit (ICU) at Beaumont. Plaintiff had been placed on a pacemaker after surgery, but it was removed on July 25 and the wires attaching the pacemaker to her heart were capped. She was initially placed on several medications, including the pressor Epinephrine, the antitrope Primacor, and Dobutamine, which affects the contractility of the heart. Plaintiff was weaned off Ephinephrine and Dobutamine on July 26 and off Primacor on July 28.[3] She was also on Dopamine in the ICU, but her dosage of Dopamine was weaned down to 1.5 micrograms on July 26.[4] Finally, plaintiff was prescribed Amiodarone, a drug designed to slow her heartbeat and keep her from experiencing atrial fibrillation.

Plaintiff remained in the ICU until July 29. At 8 a.m. that morning, plaintiff's catheter was removed and plaintiff later walked to the bathroom to urinate. Plaintiff's Dopamine and Lasix drips were also discontinued.

That morning, Shannon and Cindy Decker, a nurse practitioner in the ICU, examined plaintiff. Shannon cleared plaintiff to transfer to 5 North, the telemetry or "step-down" unit at Beaumont. Decker wrote plaintiff's transfer order. Plaintiff was assigned to an activity level of "up with assistance" and was ordered to receive "progressive ambulation with assistance." Plaintiff was also permitted to have bathroom privileges with assistance.

Plaintiff was transferred to the step-down unit at 12:30 p.m. and was hooked up to a telemetry monitoring system. Plaintiff's bed was between 12 and 15 feet from the bathroom, which was near the entrance to the room. The nurse's station was approximately ten feet away from the door to plaintiff's room.

Linda Louzon, a registered nurse at Beaumont, was assigned to care for plaintiff in the step-down unit. Accordingly, Louzon knew that plaintiff had been taking medications to maintain her heart rate and blood pressure in the ICU and was still on some medications. Louzon also knew that plaintiff had been to the bathroom in the ICU, had been able to use the call light in the bathroom in the ICU, and did not have any problems when using the bathroom.

Shortly before 2:00 p.m., plaintiff and Cooper were alone in plaintiff's room. Plaintiff told Cooper that she wanted to urinate and requested, "Mom, please have them get the bedpan for me." Cooper activated the call bell, and a nursing aide entered the room.[5] Cooper and plaintiff both claim that they asked the nursing aide if she would get plaintiff a bedpan, but the aide responded that she first needed to determine if plaintiff should ambulate to the bathroom to

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[3] Primacor has a half-life of approximately 15 minutes. Because plaintiff was taken off this medication on July 28, she would not have had Primacor in her system on July 29.

[4] At this dosage, Dopamine does not affect the pumping of the heart. Plaintiff continued to receive this smaller dosage to stimulate her kidneys.

[5] The nursing aide was never identified at trial. Plaintiff could not recall who helped her to the bathroom.

urinate. Plaintiff claimed that she told the aide that she didn't think she could walk to the bathroom.

According to Cooper, the aide then left, returned alone, and told Cooper that she needed to get up to use the bathroom.[6] Although Cooper and plaintiff both claim that they told the aide that plaintiff was too tired to get up and wanted to use the bedpan, the aide proceeded to encourage plaintiff to get out of bed. However, neither Cooper nor plaintiff protested when the aide helped plaintiff out of bed.

Louzon's description of these events differs. According to Louzon, at 2:00 p.m. a nursing aide notified her that plaintiff wanted to urinate. When Louzon and the aide went to plaintiff's room, plaintiff told Louzon that she did not want to walk to the bathroom because she was not feeling well. However, Louzon discussed the importance of ambulating at this time and encouraged plaintiff to get up and walk to the bathroom with assistance. Louzon maintained that after she talked with plaintiff, plaintiff expressed willingness to get out of bed. Although Louzon did not offer to let plaintiff use the rolling commode in her room, she claimed that she never told plaintiff that she could not use her bedpan or that she had to get up and walk to the bathroom. Louzon was not concerned that plaintiff would not be safe in the bathroom, because plaintiff's bathroom contained a call light that she could activate if she needed assistance and nurses and aides in the hallway would check on plaintiff periodically.

The aide sat plaintiff on the edge of her bed and, after a few minutes, helped her to her feet, and helped her walk to the bathroom using a walker. As plaintiff and the aide walked to the bathroom, Louzon left plaintiff's room to take her scheduled lunch break. Cooper also left the room to make some phone calls.

According to plaintiff, it took her approximately a minute-and-a-half to walk from her bed to the bathroom. Plaintiff claimed that she felt even weaker when she stood and walked to the bathroom, but she did not tell the aide how she felt. As soon as plaintiff entered the bathroom, the aide helped her sit on the toilet, left, and shut the bathroom door.[7] Soon thereafter, plaintiff recalled thinking that she did not feel well and needed help. Plaintiff claimed that because she did not have the strength to yell, she went to reach for the call button, but she believes that she lost consciousness at this point. Her next clear memory was of waking up in the ICU days later. She does not know how long she was in the bathroom after she lost consciousness.

Testimony by hospital personnel established the following series of events. Cynthia Amallia, a telemetry technician at Beaumont, was monitoring plaintiff's heart rhythms in the telemetry monitoring station that afternoon. At some point, the alarm for plaintiff's telemetry monitor activated. When Amallia noticed the alarm, she called the step-down unit to inform

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[6] In plaintiff and Cooper's version of events, Louzon was not in plaintiff's room when the aide got plaintiff out of bed.

[7] Plaintiff did not ask the aide to stay in the bathroom or to keep the bathroom door open.

them that plaintiff needed assistance. Lorna Post-Powell, a nurse on the step-down unit, answered the phone located at the nurses' station and was told that plaintiff had a low heart rate and needed immediate assistance. Amallia called the step-down unit at or just before 2:12 p.m.

Post-Powell immediately went to plaintiff's room to assess her. It took Post-Powell less than 30 seconds to get to plaintiff's room from the nurses' station. Post-Powell entered the bathroom and found plaintiff sitting on the toilet. Plaintiff was conscious, but she was pale, sweaty, and was leaning slightly to the left. Post-Powell claimed that she and plaintiff communicated, but she does not remember what was said. Plaintiff was alone in the bathroom when Post-Powell entered.[8]

When Post-Powell saw plaintiff, she quickly called for assistance. Decker received the call.[9] Decker was in the ICU on the second floor at the time, but she immediately went to plaintiff's room, located on the fifth floor. On the way to plaintiff's room, Decker briefly stopped at the nurse's station to check plaintiff's heart rhythm at the remote telemetry monitoring unit, and she determined that plaintiff was in heart block. When Decker reached plaintiff's room, she entered the bathroom, saw plaintiff sitting on the toilet, obtained a pacemaker, and attached the pacemaker to plaintiff. Decker noticed that Post-Powell was in the bathroom when she first entered, but she did not see Cooper in either the bathroom or the bedroom at the time. Decker recalled that plaintiff was conscious and told her that she was dizzy.

After Decker connected plaintiff to the pacemaker, she and Post-Powell placed plaintiff on the rolling commode, pushed her to her bed, and got her situated on the bed. According to Post-Powell, plaintiff was conscious at this point. Decker then performed a physical examination of plaintiff, checked her vital signs, checked the pacemaker to ensure that it was working properly, and determined that plaintiff was stabilizing. Plaintiff's blood pressure at the time was 102 over 60 and that her heart rate had not dropped below 40 beats per minute.[10] Decker did not observe anything that would make her believe that plaintiff would go into cardiogenic shock that evening. Decker notified Tobin regarding what had happened.

Louzon had taken her lunch break in the break room on the floor, which was a couple doors away from plaintiff's room. After helping Decker place plaintiff on the bed, Post-Powell went to the break room to tell Louzon what had happened. When Louzon heard this news, she returned to plaintiff's room to check on her. Plaintiff's room was crowded, and Louzon claimed that both Decker and McCoy were present and that McCoy was assessing plaintiff. Louzon

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[8] Post-Powell did not know if Cooper was in plaintiff's bedroom or if she came into the bathroom at some point.

[9] Although Decker was a nurse practitioner in the ICU, she was still assigned to oversee plaintiff's care until the end of her shift that day. Maryanne McCoy, a nurse practitioner in the step-down unit, would then take over plaintiff's care.

[10] Decker noted that plaintiff's blood pressure was not consistent with cardiogenic shock. Plaintiff was being paced at the time her blood pressure was taken.

noted that plaintiff was conversing with McCoy, but she also would close her eyes and look as if she were trying to rest.

Cooper's version of events differs drastically from that presented by Louzon, Post-Powell, and Decker. Cooper claimed that she was away from plaintiff's room between 15 and 20 minutes.[11] She claimed that she spent five or six minutes making phone calls at a phone bank in the hallway and then spent between eight and ten minutes in the family waiting room on the floor before returning to plaintiff's room. Cooper described the ensuing events as follows:

> When I walked down the hall I noticed that the door to [plaintiff's] room was still closed. So I thought that's strange but maybe they're working with her. So I thought—I knocked on the door and no response. So I opened it and the bathroom was to the left. And the door was closed. I opened it and [plaintiff] was sitting on the toilet but she was on the floor. Her head was almost touching the floor. Her eyes were rolled back in her head. She was totally waxen and covered with sweat. She was not responding. I truly thought she had left us at that time.

Cooper claimed that nobody was in plaintiff's room or in the bathroom when she entered. She continued,

> I said, 'Are you all right?' And she just looked at me and she did not respond. And her hand was down trying—I could see she was trying to reach the call bell. And she was just covered with sweat. I have never in my life seen a patient do that. And I quickly turned the call bell on. And I screamed. I just screamed for somebody to come help me.

According to Cooper, about a minute later, a hospital employee entered the room, followed quickly thereafter by another employee. Cooper told them that they needed to get plaintiff into bed. Cooper and the employees put plaintiff on the rolling commode and took her to her bed, where she was connected to a pacemaker. Cooper noted that plaintiff appeared semiconscious at the time; although she could shake her head and moan, she was unable to appropriately respond to Cooper.

Post-Powell, Decker, and Louzon all denied hearing Cooper call for help. Louzon also disputed plaintiff's claim that she had been left alone in the bathroom for over 15 minutes. Louzon noted that she had gone to the break room immediately after leaving plaintiff's room. She retrieved her lunch and was just sitting down when Post-Powell came into the break room. Louzon maintained that she was away from plaintiff's room for only a few minutes, not for 15 or 20 minutes.

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[11] Cooper acknowledged that she did not keep track of the length of time she was away from plaintiff's room, and she admitted that she is not a good judge of time.

After notifying the step-down unit that plaintiff was in heart block, Amallia printed rhythm strips for plaintiff's medical chart that showed her heart rhythm at the time of the heart block. To print these strips, Amallia retrieved data regarding plaintiff's heart rhythm starting from the point where her heart block began.[12] She ran a strip of plaintiff's heart rhythm starting at 2:11:05 p.m., which indicated that some form of heart block had started by this point. However, the strip did not show a period before the point at which plaintiff entered heart block or the exact moment at which she entered heart block. Regardless, both Amallia and Monique Brand, the director of the telemetry monitoring station at Beaumont, maintained that the 2:11 p.m. strip represented plaintiff's heart rhythm at the point when the heart block began.[13] Amallia also ran a strip starting at 2:12:13 p.m., on which she noted that a "high grade AV block" had occurred and that a nurse had been notified.

Tobin examined plaintiff later that afternoon. He noted that plaintiff was sweaty, but she was also conscious and conversant. Regardless, he was concerned about plaintiff's condition, because the episode of heart block indicated that she had conduction system disease and that the medical staff needed to find a way to permanently stabilize the electronic conduction system in her heart. Tobin also viewed the rhythm strips that Amallia had printed that afternoon. He determined that the 2:11 p.m. strip indicated that plaintiff's heartbeat was not normal at this time, but she had not entered complete heart block.[14] He determined that the 2:12 p.m. strip indicated that plaintiff was in complete heart block, and he determined that plaintiff had entered complete heart block between 2:11:15 p.m. and 2:12:31 p.m. He also noted that plaintiff's heart rate only dropped to approximately 45 beats per minutes. Although this heart rate was below normal, it was not extremely low. Based on his observations of plaintiff that afternoon, Tobin would not have predicted that plaintiff would later enter cardiogenic shock.

Although the medical personnel who saw plaintiff that afternoon claimed that she was conscious and conversant, they also noted that her condition had deteriorated from earlier in the day. Decker and McCoy agreed to transfer plaintiff to the ICU and received Tobin and Shannon's consent. Plaintiff was transferred back to the ICU at about 6:00 p.m. At about 8:00 p.m. that evening, plaintiff suffered respiratory failure and cardiac arrest and was placed on a ventilator.

Although he could not identify exactly what caused her to go into cardiac arrest, Tobin maintained that there was no correlation between plaintiff's cardiac arrest and her heart block earlier in the day. He explained that although an electrical abnormality in the heart could cause cardiac arrest, plaintiff's heart was being paced and her heart rhythm had been normalized at the

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[12] Technicians typically did not run strips from a time period before the point at which heart block began because this was extraneous information for the physicians.

[13] Amallia explained that the nurses and physicians reviewing incidences of heart block wanted to know when the heart block started, and technicians would print strips starting at the point at which the heart block began. Therefore, Amallia explained, although she might be a beat or two off, the 2:11:05 p.m. strip represented the point at which plaintiff entered heart block.

[14] Tobin admitted that the strips did not indicate the moment when plaintiff entered heart block.

time she suffered cardiac arrest. Accordingly, the electronic conduction system in plaintiff's heart was stabilized and would not have caused the cardiac arrest.[15]

Plaintiff was discharged from the hospital on August 20, 2002. However, after her discharge, plaintiff still faced complications arising from her heart problems, including atrial fibrillation. Plaintiff was placed on the blood thinner Coumadin to address this problem, but as her blood became thinner, she began bleeding into her lungs and intestines. Plaintiff was readmitted to the hospital in September 2003 to address this blood loss and was off work for approximately two months.[16]

Plaintiff experienced congestive heart failure and episodes of pleural effusion after her release from the hospital, which Tobin also maintained were not related to the heart block. A November 2003 echocardiogram of plaintiff's heart indicated that the right chamber of plaintiff's heart was enlarged and that she had moderate right ventricular dysfunction. After examining plaintiff in November 2003, Tobin also noted that she had moderately severe tricuspid regurgitation with at least moderate pulmonary hypertension. Tobin had not noticed this abnormality in the echocardiograms of plaintiff's heart taken in July 2002. He determined that plaintiff's congestive heart failure had been caused, in part, by damage to the right side of her heart, resulting from the normal progression of her heart disease. Tobin maintained that the heart block would not have caused damage to the right side of her heart because it would not have affected the blood flow to her heart.

Plaintiff began working as a case manager for a Medicaid waiver program in 1999. In 2002, plaintiff was earning $23.31 an hour, which corresponded to an annual salary of approximately $48,000. Plaintiff's insurance company found her eligible for short-term disability benefits and paid her $559.44 weekly in benefits beginning on July 29, 2002, and ending on October 26, 2002. Tobin cleared plaintiff to return to work without restrictions on December 23, 2002, and plaintiff returned to work in January 2003. However, plaintiff claimed that her health problems had an effect on her job performance:

> My previous job was as a case manager for this Medicaid waiver program and a lot of my job involved going to my client's [sic] homes and assessing them. And a lot of them, you know, you had to walk up stairs and that was—you know, by the time I had their little file in my hand and my purse and then climbing the stairs, it slowed me down. I did it, but I definitely slowed down. Even just walking back and forth to my car was slower.

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[15] Plaintiff was diagnosed with a shocked liver and shocked kidneys after suffering cardiac arrest. Tobin maintained that the shocked liver and shocked kidneys were not caused by plaintiff's heart block because the heart block had been resolved when plaintiff suffered cardiac arrest, and the cardiac arrest is what caused the damage to her liver and kidneys.

[16] Tobin maintained that the atrial fibrillation and bleeding that plaintiff experienced were not related to the heart block.

Plaintiff lost her job in April 2005. She was told that the organization was forced to make budget cuts and that she was being eliminated because she was a less productive worker. However, she testified that she believed she was let go was because of her health care costs. Plaintiff found another job in October 2005 as a telephone triage nurse for Blue Cross. This job pays her approximately $5,000 less a year than her previous job.

At trial, registered nurse Sharon Van Riper discussed the nursing standard of care in this situation. Van Riper also noted that plaintiff's medical records indicated that on July 29 she was weaned off medications designed to maintain her blood pressure and heart rate but was still taking Amiodarone, and that she had experienced ventricular standstill on July 22. Van Riper claimed that the nursing personnel had the duty to monitor plaintiff to determine whether the changes to her medication would cause her heart rate to slow or blood pressure to drop. She also noted that plaintiff had experienced ventricular standstill on July 22 and needed to be closely monitored for several days thereafter. Van Riper believed that plaintiff's medical history indicated that she was at an increased risk of heart block when she was transferred to the step-down unit on July 29 and the nursing personnel in the step-down unit had a duty to be aware of this.[17]

Van Riper based her opinion that the nursing personnel had breached the standard of care on the assumption that Cooper's version of events was accurate. Van Riper claimed that the nursing personnel first committed malpractice when they made plaintiff walk to the bathroom, although plaintiff said that she was too weak to do so and the medical record indicated that plaintiff had recently been weaned off medications that regulated her heart rhythm. Given plaintiff's recent medical history, Van Riper noted, walking would not have been safe for her.

Next, Van Riper explained, the nursing personnel deviated from the standard of care when they left plaintiff unattended in the bathroom. Van Riper stated,

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[17] Van Riper explained how a reasonably prudent nurse should have concluded that plaintiff was at an increased risk of heart block:

> Well, the fact that the patient had had the ventricular standstill a few days before, the fact that the patient had been on pressor drugs, drugs to increase the heart rate and increase the heart contraction, and now those drugs were gone would allow—and the third thing is that the drug that she was on to suppress her atrial fibrillation is a drug that suppresses conduction in the heart.
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> So those three factors, a recent history of heart block, the loss of the pressor drugs to maintain a faster heartbeat and a stronger heart contraction, and the third is the drug that she was on, the Amiodarone to keep her atrial fib in check, also can promote heart block. So those three things, that nurse needed to know about all three of those things and should have, should have been told, should have known, and then should have made a plan accordingly.

> Then they took a woman who said I'm too weak to walk in the bathroom to the bathroom, and then they left her. So if they were going to force her to go, they should at the very least have stayed with her during the entire time she was in the bathroom, and they should have been within, you know, right on the other side of the door.
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> I know there was an issue with her and having, sometimes having difficulty urinating with somebody standing right there, but they could have stood right on the side of the door, leaving the door cracked open so they could hear her and she could hear them.
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> So knowing—so that's leaving her alone and then going out of the room and closing the outer door of the room so that even if she called out, she would never have been heard with both doors closed. Those are all things that are blatant malpractice in this particular case with those facts.

Van Riper explained that if a nurse or aide stood outside the bathroom door, she could have responded immediately upon seeing plaintiff pass out, ensuring that immediate nursing intervention would have been obtained when plaintiff passed out.[18]

Finally, Van Riper concluded that the nursing personnel violated the standard of care by failing to respond to plaintiff's heart block in a timely manner. Van Riper noted that the standard of care required a nurse to respond immediately to a patient in heart block.[19] Assuming that Cooper's version of events was correct, plaintiff would have been left unattended and in heart block for up to 15 minutes, which would constitute a deviation from the standard of care. Van Riper also noted that plaintiff's rhythm strips did not indicate the exact moment when her heart block started.

Louzon, however, maintained that her actions on July 29 were consistent with the standard of care. Louzon admitted that if, after assessing plaintiff's situation, she or another nurse had determined that someone needed to stand outside the door when plaintiff was in the bathroom, someone would have done so. However, Louzon also noted that plaintiff never told her that she was weak and short of breath. Louzon explained, "She was alert, she was oriented. She made the walk to the bathroom with assistance and according—you know, I felt she was doing well at that point."

Further, Louzon noted, nurses and aides typically did not wait outside the door when a patient was in the bathroom, especially because the patient might be in the bathroom for some time. Typically, the nurse or aide who assisted the patient to the bathroom would drape the cord attached to the call light over the patient's leg and then leave. The nurse or aide would remain in

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[18] Specifically, a nurse or aide could have entered the bathroom, hit the staff emergency assist button, and stabilized plaintiff until assistance came.

[19] Van Riper noted that realistically for most nurses on the unit, it would take a minute or two to get to the patient's side and respond to the heart block.

the area and check on the patient periodically, and patients were instructed to pull the cord when they were done. In the step-down unit, the nurse or aide who assisted a patient to the bathroom was then responsible for checking on the patient and helping her back to bed.

At trial, defendant also presented two nurses to testify regarding the nursing standard of care in this situation. Valerie Gorham and Mary Hicks opined that the nursing staff at Beaumont did not violate the standard of care when they got plaintiff up to ambulate to the bathroom on the afternoon of July 29. Hicks noted that although plaintiff had orders to receive bathroom privileges with assistance and to ambulate, a reasonably prudent nurse would not interpret these orders to mean that she was required to stay with plaintiff when plaintiff was in the bathroom. Instead, a reasonably prudent nurse in a step-down unit would rely on telemetry monitoring to warn her if plaintiff suddenly experienced an abnormality in her heart rhythm. Hicks also noted that plaintiff's orders were to ambulate and to have bathroom privileges with assistance, and the nursing flow sheet indicated that Louzon determined that plaintiff was strong enough to walk to the bathroom with assistance. Hicks did not notice anything in plaintiff's medical record indicating that changes in plaintiff's medication would have increased her likelihood of suffering heart block.

Hicks and Gorham also noted that the nursing personnel did not violate the standard of care when they did failed to stand outside the bathroom door when plaintiff was urinating. Plaintiff was alert, oriented, and knew how to use a call light when she was taken to the bathroom. Under these circumstances, the order that plaintiff receive "bathroom privileges with assistance" did not mean that a nurse or aide had to stand in or just outside the bathroom as plaintiff used the toilet. Hicks also noted that nurses and aides were in the hallway a few feet away from the bathroom door, it would not have been necessary to have a nurse or aide stand right outside the bathroom door. Hicks did not notice anything in the record that would allow her to conclude that the nursing response to plaintiff's heart block was delayed because nobody stood outside the bathroom door.

Finally, Gorham and Hicks disputed plaintiff's claims that a nurse could have more quickly responded to plaintiff's heart block if she were standing outside the bathroom door. They each explained that if a nurse found patient unconscious in the bathroom, it would not have been reasonable for the nurse to automatically assume that plaintiff was in heart block and hook her up to a pacemaker. The nurse would only have been able to determine that plaintiff was in heart block and needed to be attached to a pacemaker by looking at plaintiff's heart rhythm strips. Hicks also noted that plaintiff could have just as easily entered heart block lying in bed.

In addition, both Gorman and Hicks concluded that, assuming the nursing personnel's version of events was true, no violation of the standard of care occurred on July 29. The nurses responded to the call from telemetry and connected plaintiff to a pacemaker within approximately three minutes of learning that plaintiff was in distress. This is consistent with the standard of care for responding to a patient in heart block. Gorman admitted that leaving a patient in heart block for up to 15 minutes would constitute a deviation from the standard of care, but she noted that plaintiff's medical record did not indicate that she was left in heart block for this amount of time. Further, Gorman noted that if plaintiff were left in heart block for approximately 15 minutes, her condition would have worsened, her blood pressure would have dropped, and she likely would have entered cardiac arrest.

At trial, Tobin explained that in light of the fact that plaintiff was on continuous telemetry monitoring on the afternoon of July 29, there was no medical reason for a nurse to stay with plaintiff when she was sitting on the toilet in the bathroom.

Plaintiff also submitted the deposition of Arthur Levene, a cardiologist from Littleton, Colorado, who testified regarding the effect of heart block on plaintiff's medical condition. He explained that in instances of severe heart block, cardiac output drops. If an individual has a marginal heart to begin with, this drop in cardiac output could lead to cardiac arrest, shock, unconsciousness, and other problems. He also noted that the drugs that plaintiff had been taking were designed to make her heart beat faster and, therefore, they tended to prevent heart block and to increase cardiac output. Levene claimed that stopping these drugs could increase plaintiff's risk of suffering heart block because she had an imperfect electrical conduction system in her heart and was taking Amiodarone, which slowed her heartbeat.

Levene also assumed that Cooper's description of the events that occurred when plaintiff suffered heart block were accurate.[20] Levene described the effect of leaving plaintiff alone for up to 15 minutes while she was in heart block and unconscious:

> Well, what happened, because we had this marginal heart function to begin with, . . . now the problem with the heart not synchronized correctly, with a heart rate being too slow, for whatever period of time it was—And to my way of thinking, whether it be 3, 5 minutes or 10 or 15 minutes, it didn't matter. I mean, that period of time was too much because she developed an impending shock-like state. She was ultimately transferred down to the intensive care unit where she went on to develop a—what we call a core zero or a code or an arrest, where she wasn't breathing well, heart wasn't beating well. She required cardiopulmonary resuscitation, or CPR, for 5 to 6 minutes, and then developed damage to her lungs where she was in shock lung, as we state, which means she had to be intubated, ventilated, on a ventilation device for a long period of time. Her liver function shut down, so her liver got badly damaged. Her kidneys shut down. She went into renal failure, as we state. Her pancreas shut down. And she required a lengthy stay in the intensive care unit. And she's actually very, very fortunate that she survived this. Most people would not.

Levene explained that plaintiff's cardiac arrest that evening was probably a delayed response to the cardiogenic shock that she slipped into when she went into heart block:

> She was in impending shock. She may have been developing what we call acidosis where the acidification of the body was too much because of, what we say, poor perfusion, meaning that there's not enough blood getting to all the organs and that they're starting to develop problems. It was a big enough insult in

[20] Levene admitted that he did not know how long plaintiff remained in heart block before she received assistance. He merely concluded that it was long enough to cause these health problems.

> an individual who had a marginal heart to begin with, for all the reasons we talked about, who is just a few days after surgery, that that led to that cascade of events that occurred with the shock that I described earlier.

Levene noted that if plaintiff had received intervention within one to three minutes of entering heart block, it would have been more likely that she would have avoided cardiac arrest.

Levene also maintained that plaintiff's subsequent medical problems ultimately were triggered by or worsened as a result of the heart block and subsequent cardiac arrest. Levene explained,

> She had the problems we alluded to earlier, the lengthy stay, the development of the failure of all the organ systems that I talked about earlier; most of them took a long time to recover. And then she, after that, seems to be left with some problem with her lung and her pressure in the lungs that was not present before this event, where she now has what we call evidence of pulmonary hypertension and right heart failure, meaning that the pressures on the right side of her heart are elevated.
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> She now has significant leakage of the valve on the right side of the heart called the tricuspid valve. That can lead to fluid retention, and, indeed, she has had fluid around her lungs from time to time. She had another few events and hospitalizations involving fluid, shortness of breath, and what was diagnosed as heart failure later.

Defendant submitted the deposition of John Nicklas, a cardiologist affiliated with the University of Michigan hospitals, who also discussed the effect of plaintiff's heart block on her health. Nicklas admitted that plaintiff was at risk of heart block on July 29 as a result of her history of conduction disease. However, he also noted that after reviewing plaintiff's medical record, he found no reason not to encourage her to get up and walk to the bathroom on the afternoon of July 29. He maintained that it was important for her to ambulate after her surgery and noted that ambulating to the bathroom did not cause plaintiff to experience heart block. Instead, Nicklas theorized that plaintiff probably suffered heart block because she was taking Amiodarone, which caused her heart rate to decrease.

Nicklas also determined that plaintiff's heart was not damaged as a result of the heart block. He noted that echocardiograms of plaintiff's heart taken before and hours after the heart block indicated that plaintiff's ejection fraction remained relatively constant, which in turn indicated that plaintiff's heart had not been damaged by the heart block. Plaintiff also appeared to regain normal blood pressure and normal perfusion after she was paced. Nicklas claimed that plaintiff's heart block did not trigger her cardiac arrest later that evening or otherwise have any effect on her later health problems. Specifically, he noted that the heart block would not have triggered plaintiff's cardiac arrest on the evening of July 29 because plaintiff was being paced at the time.

Finally, Nicklas found no evidence in plaintiff's medical record to indicate that plaintiff was injured or harmed as a result of the nursing personnel's conduct on July 29, although he

admitted that he could not definitively tell from the medical record how long plaintiff was in heart block before she was paced. He explained,

> From the medical record, I can find no evidence that the nurse did anything but try to help Mrs. Barber.
>
> I do not think that encouraging her to go to the bathroom was the cause of the heart block, rather I think that it was a consequence of the accumulation of the medicine that's known to have this very side effect.
>
> And as best I can tell, the nurse in a timely fashion reattached Mrs. Barber to an external pacemaker when she discovered that her heart rate was low. At the time of reattaching her, as best I can tell, perfusion was normal as recorded, or evidenced by her blood pressure.
>
> Subsequent events, as best I can tell from the medical record, are unrelated to the episode of heart block.

At trial, Janelle Vincent, a subrogation specialist at Blue Cross Blue Shield of Michigan (Blue Cross), claimed that Blue Cross paid $70,977.08 for medical expenses incurred as a result of the July 29 heart block. She came up with this figure after going through a spreadsheet listing plaintiff's medical expenses paid by Blue Cross since July 29, determining which expenses were incurred as a result of the heart block, and adding these expenses to calculate a total cost. Vincent is not a physician and did not have a physician review the expenses to determine which were incurred as a result of the heart block.

The jury found that Beaumont employees were professionally negligent in one or more of the ways claimed by plaintiff, that plaintiff suffered injury or damage, and that professional negligence was a proximate cause of this injury or damage. The jury then determined that plaintiff suffered $90,977 in economic damages "for medical expenses and/or wage loss to the present time." The jury also determined that plaintiff suffered $67,489 in non-economic damages, including "fright, shock, embarrassment, humiliation, mortification, pain, suffering and loss of social pleasures up to the present time."

The parties do not dispute that in April 2006, this case was evaluated at $190,000 and that plaintiff accepted and defendant rejected the case evaluation award. On September 6, 2006, the trial court entered a judgment of $197,528.58 in favor of plaintiff and against defendant.[21]

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[21] The judgment included the following sums: (1) $10,515.93 in prejudgment interest from the date the complaint was filed through July 31, 2006; (2) $590 in court fees and costs; (3) $50 in statutory attorney fees; (4) $8,490 in expert fees and expenses; (5) $2,685.80 in deposition video and transcript fees; (6) $1,670.81 in subpoena service and medical records fees; and (7) $15,000 in a case evaluation sanction attorney fee. The trial court noted that the judgment would continue to accrue interest at the statutory judgment interest rate from August 1, 2006, until the time the judgment was satisfied.

On September 11, 2006, defendant moved for judgment notwithstanding the verdict (JNOV) or, in the alternative, for a new trial or remittitur, claiming that the jury finding that the alleged malpractice was a proximate cause of any harm to plaintiff was based on speculation and conjecture. The trial court denied defendant's motion. The trial court stayed proceedings and execution of the judgment pending resolution of this appeal.

II.

First, defendant argues that the trial court erred when it denied its motions for a directed verdict and for JNOV and a new trial because plaintiff failed to demonstrate both factual and legal causation to support her theory that the nursing staff's delay in intervening to treat her heart block caused her to sustain severe and permanent injuries. We disagree. We review de novo a trial court's decision to grant or deny a motion for a directed verdict and for JNOV. *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997); *Craig v Oakwood Hosp*, 471 Mich 67, 77; 684 NW2d 296 (2004). "When evaluating a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party. Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ." *Meagher*, *supra* at 708 (citations omitted). A trial court may only grant a motion for JNOV when, "viewing the evidence and all legitimate inferences in the light most favorable to the nonmoving party, there are no issues of material fact with regard to which reasonable minds could differ." *Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 14; 596 NW2d 620 (1999). "If reasonable jurors could disagree, neither the trial court nor this Court has the authority to substitute its judgment for that of the jury." *In re Leone Estate*, 168 Mich App 321, 324; 423 NW2d 652 (1988).

We review the trial court's denial of a motion for a new trial for an abuse of discretion. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). "The trial court's function with respect to a motion for a new trial is to determine whether the overwhelming weight of the evidence favors the losing party." *Scott v Illinois Tool Works, Inc*, 217 Mich App 35, 41; 550 NW2d 809 (1996). Our function is "to determine whether the trial court abused its discretion in making such a finding." *Id.* Similarly, "[w]hen reviewing a claim that insufficient evidence was presented in a civil case, this Court must view the evidence in a light most favorable to the plaintiff and give the plaintiff the benefit of every reasonable inference. If, after viewing the evidence, reasonable people could differ, the question is properly left to the trier of fact." *Id.* (citations omitted).

"In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants." MCL 600.2912a(2). "In a medical malpractice case, the plaintiff bears the burden of proving: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury. Failure to prove any one of these elements is fatal." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 492; 668 NW2d 402 (2003), quoting *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). Because defendant only disputes whether the evidence presented at trial supports the causation element of plaintiff's malpractice claim in its question presented, this is the primary element that we will consider.

"'Proximate cause' is a legal term of art that incorporates both cause in fact and legal (or 'proximate') cause." *Craig*, *supra* at 86. In *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994), our Supreme Court defined these terms as follows:

> The cause in fact element generally requires showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred. On the other hand, legal cause or "proximate cause" normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences.

"As a matter of logic, a court must find that the defendant's negligence was a cause in fact of the plaintiff's injuries before it can hold that the defendant's negligence was the proximate or legal cause of those injuries." *Craig*, *supra* at 87.

The *Craig* Court explained in more detail the manner of establishing cause in fact and legal causation:

> Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or "but for") that act or omission. While a plaintiff need not prove that an act or omission was the *sole* catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was *a* cause.
>
> It is important to bear in mind that a plaintiff cannot satisfy this burden by showing only that the defendant *may* have caused his injuries. Our case law requires more than a mere possibility or a plausible explanation. Rather, a plaintiff establishes that the defendant's conduct was a cause in fact of his injuries only if he "set[s] forth specific facts that would support a reasonable inference of a logical sequence of cause and effect." A valid theory of causation, therefore, must be based on facts in evidence. And while "'[t]he evidence need not negate all other possible causes,'" this Court has consistently required that the evidence "'exclude other reasonable hypotheses with a fair amount of certainty.'" [*Id.* at 87-88 (citations omitted).]

First, defendant argues that plaintiff failed to establish cause in fact because she was unable to establish the onset time of complete heart block in relation to the time she was allegedly unattended. Admittedly, plaintiff's heart rhythm strip indicated that she was in heart block at 2:11:05 p.m. and that nursing personnel on the step-down unit were contacted at 2:12 p.m., and Amallia maintains that the beginning of the 2:11 p.m. strip represents the point at which plaintiff's heart block began. However, several witnesses who interpreted the heart rhythm strip at trial admitted that the strip did not indicate the exact moment at which plaintiff entered heart block. Further, Cooper testified that she left plaintiff's room as plaintiff and an aide were walking to the bathroom and found plaintiff unconscious on the toilet when she returned to plaintiff's room 15 to 20 minutes later. Plaintiff testified that she lost consciousness soon after she sat on the toilet, and Levene indicated that plaintiff's loss of consciousness was a sign that plaintiff might be in cardiogenic shock. Although this evidence does not establish the exact moment at which plaintiff entered heart block, the evidence is sufficient for reasonable jurors to conclude that plaintiff was unconscious and in heart block for more than the three-

minute period that several nurses testified was the time within which a nurse must respond to a patient in heart block in order to conform to the standard of care.

Defendant next argues that plaintiff failed to establish that prompt intervention would have occurred even if plaintiff were fully supervised in the bathroom. However, Van Riper testified that given plaintiff's condition at the time she walked to the bathroom, a nurse should have stayed with plaintiff while she was in the bathroom or stood just outside the bathroom door in order to respond immediately if plaintiff needed help. Van Riper also testified that if a nurse was standing outside the bathroom door, she would hear plaintiff if plaintiff was in distress. Louzon noted that the standard of care required a nurse who had helped a patient to the bathroom to check on her periodically. This evidence, when combined with Cooper's testimony that plaintiff was left alone and unconscious in the bathroom for up to 15 to 20 minutes, is sufficient to permit a reasonable juror to find that prompt intervention would have occurred if plaintiff had been supervised while in the bathroom.

Further, defendant argues that plaintiff failed to establish that if her condition had been discovered earlier, she would have received nursing intervention more quickly. Again, plaintiff does not present hard data to establish the exact moment when she entered heart block, and the jury had the discretion to disbelieve Amallia's testimony that plaintiff entered heart block at 2:11 p.m. and that she contacted the step-down unit at 2:12 p.m. Conversely, Cooper claimed that plaintiff was left alone in the bathroom for up to 15 to 20 minutes, plaintiff claimed that she lost consciousness soon after entering the bathroom and sitting on the toilet, and Levene indicated that heart block could cause an individual to enter a state of shock and lose consciousness. Further, several nurses testified that the standard of care required a nurse to promptly attend to a patient in heart block. This evidence is sufficient to permit a reasonable juror to determine that if a nurse had been stationed in the bathroom or outside the door when plaintiff was in the bathroom, she would have intervened within the period of time required by the standard of care.

Defendant also argues that plaintiff failed to establish legal causation because she failed to establish that her injuries arose from the risks attendant to leaving her unattended in the bathroom. However, Levene opined that the delayed intervention to the heart block caused plaintiff to enter a state of shock and later enter respiratory and cardiac arrest. He also claimed that all plaintiff's health problems following her heart block (except for an unrelated bout of breast cancer) had been caused or exacerbated by the cardiac arrest. Further, as described earlier, plaintiff presented sufficient testimony to permit a reasonable juror to conclude that the nursing personnel did not respond to her heart block in a timely manner because they were not monitoring her from outside the bathroom door while she was using the bathroom. Accordingly, plaintiff presented sufficient evidence to permit a reasonable juror to conclude that she established legal causation.[22]

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[22] Defendant argues that plaintiff failed to establish legal causation because she could have just as easily entered heart block if she was lying in bed. However, considering that no evidence was provided regarding the standard of care for monitoring a patient in plaintiff's condition when she (continued…)

Because a question of fact exists regarding which version of events is correct, the trial court did not err when it denied defendant's motions for a directed verdict and for JNOV. Further, because the evidence in this case is largely testimonial in nature, we conclude that the overwhelming weight of the evidence does not favor defendant and that the trial court did not abuse its discretion when it denied defendant's motion for a new trial.

In addressing this issue, we make one important observation that reaches the heart of defendant's argument. Although defendant goes to great pains to avoid stating outright that it wants this panel to act as a fact-finder and substitute our findings of fact for those of the jury, its presentation of plaintiff's version of events as unbelievable and its willingness to disregard testimony by plaintiff's witnesses (especially Cooper) in its arguments before this Court indicate that it wants this Court to not only enter into factfinding, but to substitute its findings for those of the jury. This we will not do. The jury, and not the trial court or this panel, is the appropriate fact-finder in this case. Although defendant arguably presented a larger volume of evidence to support its position than did plaintiff, and although this panel might have decided the case differently if it were the fact-finder, the plaintiff presented sufficient evidence to establish her case and the jury chose to accept plaintiff's version of events over defendant's version. Under these circumstances, we will not substitute our judgment regarding this matter for that rendered by the jury. We are especially reluctant to substitute our judgment for the jury's findings of fact because the evidence establishing plaintiff's version of events is largely based on witness credibility, and we note that the jury is in a superior position to observe and evaluate witness credibility. *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002); MCR 2.613(C). Further, the jury has the discretion to believe or disbelieve testimony, even when a witness's statements are uncontradicted. *Baldwin v Nall*, 323 Mich 25, 29; 34 NW2d 539 (1948).

III.

Next, defendant argues that the trial court erred when it denied defendant's motions for a directed verdict and for JNOV on the ground that the opinions of plaintiff's expert witnesses were based on foundational facts contrary to those established in the record. We disagree.

In *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 286; 602 NW2d 854 (1999), this Court stated:

> [A]n expert's opinion is objectionable where it is based on assumptions that are not in accord with the established facts. *Green v Jerome-Duncan Ford, Inc*, 195 Mich App 493, 499; 491 NW2d 243 (1992); *Thornhill v Detroit*, 142 Mich App 656, 658; 369 NW2d 871 (1985). This is true where an expert witness' testimony is inconsistent with the testimony of a witness who personally observed an event in question, and the expert is unable to reconcile his inconsistent testimony other than by disparaging the witness' power of observation. *Green*, *supra* at 500.

(…continued)

was in bed, we choose not to engage in defendant's speculation.

However, both Levene and Van Riper based their expert testimony on plaintiff's version of events, namely, that plaintiff was left alone in the bathroom, unconscious and in heart block, for as long as 15 to 20 minutes. Although defendant presented evidence establishing that nursing personnel responded promptly when plaintiff entered heart block, plaintiff and defendant's scenarios of the events surrounding plaintiff's heart block differ, and the question regarding the actual sequence of events surrounding plaintiff's heart block is one of fact to be addressed by the jury. If the jury accepted plaintiff's version of events, it could use the testimony provided by Levene and Van Riper to determine that the nursing personnel breached the standard of care and, as a result, plaintiff suffered a litany of heart-related ailments. Accordingly, Levene and Van Riper's expert testimony was based on facts established in the record. Therefore, the trial court did not err when it denied defendant's motions for a directed verdict and for JNOV.

IV.

Defendant also argues that the trial court erred when it ruled as a matter of law that plaintiff was not comparatively negligent. Defendant claims that because plaintiff did not tell Louzon that she was "too weak" to walk to the bathroom, she was comparatively negligent when she allowed Louzon to make the aide get her out of bed and help her walk to the bathroom. Again, we disagree. "[A] trial court's decision not to instruct the jury on comparative negligence does not amount to an abuse of discretion where the record evidence does not reveal that the plaintiff was negligent." *Clark v Kmart Corp* (*On Remand*), 249 Mich App 141, 151; 640 NW2d 892 (2002). When determining if there was evidence to support a requested instruction, the court views the evidence in the light most favorable to defendant. *Id.*

MCL 600.6304 permits comparative liability determinations in negligence cases.[23] "Under [MCL 600.6304], if a defendant presents evidence that would allow a reasonable person

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[23] The relevant provisions of MCL 600.6304 state as follows:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:
>
> > (a) The total amount of each plaintiff's damages.
> >
> > (b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under [MCL 600.2925d], regardless of whether the person was or could have been named as a party to the action.
>
> (2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

(continued…)

to conclude that a plaintiff's negligence constituted a proximate cause of her injury and subsequent damage, the trier of fact must be allowed to consider such evidence in apportioning fault." *Shinholster v Annapolis Hosp*, 471 Mich 540, 552; 685 NW2d 275 (2004).

However, defendant fails to establish evidence indicating that plaintiff's negligence was a proximate cause of the delayed response to her heart block.

> Proximate cause is that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred. It involves a determination that the connection between the wrongful conduct and the injury is of such a nature that it is socially and economically desirable to hold the wrongdoer liable. [*Ross v Glaser*, 220 Mich App 183, 192-193; 559 NW2d 331 (1996) (internal citations omitted).]

Defendant asserts that plaintiff was comparatively negligent because she failed to warn the nursing personnel that she was too weak to walk to the bathroom. However, plaintiff's malpractice claim stems from her assertion that the nursing personnel breached their standard of care when they left her alone in the bathroom. Plaintiff's alleged failure to warn the nursing personnel that she was too weak to walk to the bathroom was not a proximate cause of the delayed response to her heart block because even if plaintiff had a duty to warn the nursing personnel about her weakened condition, the damage that plaintiff claims she suffered arose from an intervening action, namely the aide's decision to leave plaintiff alone in the bathroom. Accordingly, defendant fails to establish that plaintiff's allegedly negligent acts were closely-enough linked to the harm that she suffered to be considered a proximate cause.

Further, we note that comparative negligence in medical malpractice cases applies most often in situations in which a plaintiff has failed to follow a doctor's orders. The *Shinholster* Court determined that a question of fact existed regarding whether the plaintiff was comparatively negligent because she failed to take her prescribed blood pressure medication. *Shinholster*, *supra* at 551-553. However, in *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 459-460; 633 NW2d 418 (2001), this Court determined that the defendant failed to establish a question of fact regarding whether a decedent was comparatively negligent for swimming although he had a known heart condition because "defendant introduced absolutely no evidence tending to establish that the decedent was advised that his medical condition prevented him from safely engaging in swimming or other recreational activities." Accordingly, the *Rickwalt* Court determined that the record did not support a comparative negligence instruction and, therefore, the trial court did not err when it failed to instruct the jury regarding comparative negligence. *Id.* at 460. Similarly, defendant presents no evidence to indicate that plaintiff failed to follow a

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(…continued)

* * *

> (8) As used in this section, "fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.

doctor's orders when she permitted the aide to assist her to the bathroom; in fact, defendant maintains that the nursing personnel were following the requirements in plaintiff's transfer orders when they required her to ambulate to the bathroom.

V.

Defendant argues that the trial court erred when it failed to remit or eliminate the jury's award for wage loss on the grounds that the evidence did not support the award and that the award was subsumed by a collateral source setoff. We do not agree.

Initially, we note that defendant bases its arguments on the assumption that the jury awarded $20,000 for lost wages and $70,977 for medical expenses. The relevant question on the verdict form asked, "What is the total amount of Plaintiff's economic damages, for medical expenses and/or wage loss to the present time?" Although the parties do not dispute that the jury awarded a total of $90,977 in economic damages, defendant argues that the notation "20,000 + 70,977" found on the verdict form next to the total amount awarded indicates that the jury intended to award plaintiff $20,000 for lost wages and $70,977 for medical expenses. Although practically speaking this might have been the jury's intent, the verdict form merely asked the jury to determine a total award of economic damages without separating the amounts awarded for lost wages and for medical expenses. Accordingly, the jury never formally made a finding regarding the allocation of its award of economic damages. Defendant provides no authority to support its assertion that the trial court erred when it failed to allocate the $90,977 award of economic damages into a $20,000 award for lost wages and a $70,977 award for medical expenses, and we are not required to find authority to support defendant's position. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Defendant argues that trial court should have reduced plaintiff's award for lost wages because the evidence presented at trial established that plaintiff suffered, at most, $10,000 in lost wages. As discussed above, the jury did not allocate the award for economic damages, so there is no official indication regarding the amount of economic damages attributable to lost wages. Regardless, plaintiff presented sufficient evidence to support a much higher wage-loss award than that calculated by defendant. Plaintiff presented evidence to establish that she was on medical leave from work between July 2002 and January 2003 and between September 2003 and November 2003. Further, plaintiff presented evidence to support her claim that she expected to be off work for approximately two months following her open-heart surgery and that the remainder of her time away from work in 2002 was a result of health complications that she suffered as a result of the heart block. Plaintiff also presented evidence to establish that her hospitalization in September 2003 was a result of the cardiac arrest in 2002, which, in turn, was triggered by the delayed response to her heart block. Finally, plaintiff testified that she lost her job in April 2005 in part as a result of her heart problems, was unemployed until October 2005, and is currently employed at a position that pays her approximately $5,000 less each year than her old position.

Considering that plaintiff was paid over $23 an hour at her previous job and presented testimony establishing that she was on medical leave from work for almost six months because of health problems related to the heart block and was unemployed for another six months after losing her job as a result of these heart-related health problems, plaintiff presented sufficient evidence to establish approximately $48,000 in damages for lost wages resulting from these

periods of unemployment. Further, plaintiff established that she was earning $5,000 less annually at her new position, and this evidence could be used to establish that plaintiff suffered additional lost wages after October 2005. Accordingly, we reject defendant's argument that the evidence presented at trial supported, at most, a finding of $10,000 in lost wages.

Defendant also argues that the trial court erred when it failed to reduce plaintiff's award for lost wages by $14,068.19 in disability payments. Plaintiff received these payments as compensation for wages lost between July and October 2002. Yet again, the jury did not allocate its award of economic damages and, therefore, there is no official indication regarding the particular economic damages for which the jury intended to compensate plaintiff. Regardless, even if the jury intended to award plaintiff $20,000 in economic damages as compensation for lost wages, as defendant claims, there is no indication that the jury awarded plaintiff $20,000 in lost wages to compensate plaintiff for wages lost between July and October 2002. Even assuming that the $14,068.19 in disability payments constitutes a collateral source pursuant to MCL 600.6303, defendant provides no legal authority to establish that the trial court may offset an award of economic damages by a collateral source if the exact nature of the economic damages and whether the economic damages include an amount for which plaintiff already received compensation is unclear. Again, because defendant fails to provide authority to support this position, we will not consider it further. *Mitcham*, *supra* at 203.

VI.

Defendant argues that the trial court erred when it determined that Vincent was qualified to testify regarding the medical expenses that Blue Cross incurred as a result of the injuries that plaintiff sustained arising from the alleged malpractice. In particular, defendant argues that Vincent does not have the necessary medical background to determine specifically which medical expenses incurred by plaintiff were sustained as a result of the alleged malpractice. To support its position, defendant cites Michigan case law to establish both that "[a] plaintiff is entitled to recover the reasonable and necessary outlay expended in an attempt to be cured or otherwise treated for the resultant injuries" and that the plaintiff must present qualified testimony "[t]o demonstrate what is reasonable and necessary, as well as what constitutes an outlay in an attempt to be cured for the injuries sought . . . ." However, defendant never provides any binding authority to support its argument that a physician or other qualified medical expert must review the expenses incurred by Blue Cross for plaintiff's care and determine which expenses were incurred as a result of plaintiff's heart block and the attendant malpractice. Although defendant cites Taylor, Googasian, and Falk, *Torts*, § 10:81, which recommends that "[p]laintiff's counsel *should* be prepared to have the attending physicians testify that continued treatment was administered on the basis of some medical need, and to bolster this evidence with the testimony of reviewing physicians, with co-employees, friends, and family verifying the continued symptoms they have personally witnessed," this citation does not establish that plaintiff must have a physician testify regarding the particular expenses that plaintiff incurred as a result of her heart block and the attendant malpractice. Because defendant does not provide any authority to support its position, this Court need not address it further. *Mitcham*, *supra* at 203.

Regardless, Vincent was qualified to testify regarding the expenses incurred by Blue Cross as a result of plaintiff's heart block. Vincent was a subrogation specialist at Blue Cross and plaintiff established that Vincent had significant experience going through insurance claims and determining which claims arose from a particular medical condition. Vincent testified

regarding the expenses that Blue Cross incurred as a result of plaintiff's heart block and that she calculated the amount of expenses incurred by going through claims submitted by plaintiff since the day she had heart block and determined, based on the billing information, whether the claimed expenses were related to medical treatments incurred as a result of the heart block. Further, defendant had the opportunity to cross-examine her and uncover both the nature and extent of Vincent's scientific training and experience and the fact that a physician did not review these billing records. Vincent's testimony was relevant to establish the expenses that Blue Cross incurred as a result of plaintiff's heart block. Defendant's challenges to Vincent's testimony go to the weight, not the admissibility, of her testimony.

Defendant also argues that plaintiff presented no evidence to establish that the medical expenses sought arose from the injuries sustained as a result of the alleged malpractice. Although defendant includes a list of all plaintiff's medical expenses after July 29 in the appendix to its brief on appeal, Vincent testified at trial that she only included expenses that she had determined were related to plaintiff's heart block in Blue Cross's claim for subrogation. Further, Levene testified that, in his opinion, all plaintiff's health problems following the heart block, except those relating to her treatment for breast cancer, were related to the episode of heart block. Accordingly, defendant's claim lacks merit.

VII.

Defendant argues that plaintiff's right to medical expenses as damages should be vacated because plaintiff failed to comply with the provisions of MCL 600.6303(3) by sending Blue Cross notice of the jury verdict and award of damages within the time period specified by statute. MCL 600.6303(3) states:

> Within 10 days after a verdict for the plaintiff, plaintiff's attorney shall send notice of the verdict by registered mail to all persons entitled by contract to a lien against the proceeds of plaintiff's recovery. If a contractual lien holder does not exercise the lien holder's right of subrogation within 20 days after receipt of the notice of the verdict, the lien holder shall lose the right of subrogation. This subsection shall only apply to contracts executed or renewed on or after the effective date of this section.

However, Blue Cross received notice that plaintiff was pursuing a cause of action against defendant before trial, and Vincent, a subrogation analyst at Blue Cross, testified regarding the medical expenses that Blue Cross paid on behalf of plaintiff that arose from plaintiff's heart block. In *Young v Nandi*, 276 Mich App 67; 740 NW2d 508 (2007), this Court addressed the same argument raised by defendant in this case, namely, that the amount of medical expenses paid by the insurer should be considered collateral source benefits and, therefore, not recoverable because the plaintiff failed to notify the insurer of the verdict within the time required by MCL 600.6303(3). This Court explained,

> Defendants' legal position has been rejected by our Supreme Court in *Rogers v Detroit*, 457 Mich 125, 155-156; 579 NW2d 840 (1998), overruled on other grounds in *Robinson v Detroit*, 462 Mich 439, 468 (2000). In *Rogers*, the plaintiff did not notify several contractual lienholders within 10 days of the jury verdict because she gave notice before the verdict. The defendants sought setoffs

for failure to strictly comply with MCL 600.6303(3), but the trial court refused the setoffs. The Supreme Court agreed, holding that nothing in MCL 600.6303(3)

> expressly forbids a trial judge from extending the period or recognizing "notice" occurring before the verdict. The judge did not abuse his discretion in this case. The statute also does not deprive a trial court of the authority to recognize that substantial compliance occurred in this case. The law does not require that a lienholder lose its substantive rights. It does not provide a tortfeasor with a windfall, just because lien rights were exercised at a different time than within the statutory ten-day window.
>
> A statute is to be construed to avoid inflicting hardship or reaching an unjust or unreasonable result. Here, we conclude that the overall statutory purpose was fulfilled: to avoid giving plaintiff either a double recovery or a double liability. To that end, the spirit and purpose of the legislation must prevail over the strict letter of the law. [*Rogers*, *supra* at 156-157 (citation omitted).]

[*Young*, *supra* at 85.]

Similarly, considering that Blue Cross was aware that plaintiff was pursuing this cause of action, $70,977 of the economic damages awarded to plaintiff need not be vacated under the collateral source rule simply because plaintiff allegedly failed to comply with the notice requirements of MCL 600.6303(3). Accordingly, defendant's claim that the judgment against it should be reduced by $70,977 because plaintiff failed to comply with MCL 600.6303(3) fails.

VIII.

Finally, defendant argues that the case evaluation sanctions awarded in this case should be vacated. However, defendant's argument in this case hinges on this Court's determination that its requested adjustments to the trial court verdict were warranted. Because we did not make such a determination, we need not consider whether the trial court's award of case evaluation sanctions should be vacated.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette